respondent's shop as evidenced by the lists of unredeemed articles examined by DW1, Inspector Amiruddin. The fact that the learned President did not consider the respondent's evidence that he (respondent) did not manufacture the exhibits Exhibit P1 to P18 does not, to my mind, weaken the defence story but rather strengthens the other facts stated above, i.e. that on the balance of probability he did not know that the exhibits were prohibited goods under the Customs Act. I hold that the President's conclusion to the effect is proper and justifiable. The order of acquittal of the respondent of the charge is confirmed. The appeal is hereby dismissed.

With regard to the cross-appeal by the respondent against the order of forfeiture of the exhibits, I am in agreement with the learned President. The exhibits have been proved to be prohibited goods and found in the possession of the respondent. The trial court was satisfied that an offence against the Act has been committed, i.e. the gold coins were imported by person or persons unknown without licence. The respondent was acquitted on the ground that he had no knowledge that they were prohibited. The exhibits were the subject matter of the offence. They still remain prohibited goods. They are liable to forfeiture and ought to be forfeited even though the respondent was not convicted of the offence charged. I am of the opinion that the provision of section 127 of the Customs Act applies on all fours. The cross-appeal is therefore dismissed and the order of forfeiture of the exhibits confirmed.

Appeal and cross-appeal dismissed.

Solicitors: *Karpal Singh & Co.*

MOHAMED ZAINUDDIN BIN PUTEH v. YAP CHEE SENG

[O.C.J. (Hashim Yeop A. Sani J.) November 4, 1976]
[Ipoh — Civil Suit No. 416 of 1976]

Injunction — Dissolution — Affidavit omitting material facts — Principles applicable.

This was a Notice of Motion for an order that the interlocutory injunction granted on October 11, 1976, be set aside. It would appear from the notice as well as the affidavits supporting the application that the sole ground of the application that the injunction be set aside was that the plaintiff had not stated the facts fully and accurately to the court and that he had not disclosed all material facts.

Held: applying the principles in *American Cyanamid Co.* v. *Ethicon*, the motion to dissolve the injunction should be dismissed, as there was a serious question to be tried and therefore measures should be taken to preserve the *status quo*.

[**Editorial Note:** An appeal from this decision was dismissed by the Federal Court (Gill C.J. (Malaya), Ong Hock Sim and Raja Azlan Shah F.JJ.) on April 4, 1977, Federal Court Civil Appeal No. 145 of 1976.]

Cases referred to:-

(1) *Schmitten* v. *Faules* [1893] W.N. 64.
(2) *Daglish* v. *Jarvie* (1851) 20 L.J. Ch. 475.
(3) *American Cyanamid Co.* v. *Ethicon* [1975] 2 WL.R. 316.
(4) *The Great Western Railway Co.* v. *The Birmingham & Oxford Junction Railway Co. & Ors.* E.R. Vol. 41.
(5) *Wakefield* v. *Duke of Buccleugh* (1865) 12 L.T. 628.
(6) *Cavendish House (Chettenhan) Ltd.* v. *Cavendish-Woodhouse Ltd.* [1970] R.P.C. 234.
(7) *Fellowes* v. *Fisher* [1975] 3 W.L.R. 185.
(8) *Hubbard* v. *Pitt* [1975] 3 All E.R. 10 C.A.

CIVIL SUIT.

Lim Seong Chun for the applicant/defendant.

Lim Boon Seng for the respondent/plaintiff.

Hashim Yeop A. Sani J.: This is a Notice of Motion for an order that the interlocutory injunction granted on October 11, 1976, be set aside. It would appear from the notice as well as the affidavits supporting the application that the sole ground of the application that the injunction be set aside is that the respondent/plaintiff (hereinafter referred to as "the plaintiff") had not stated the facts fully and accurately to the court and that he had not disclosed all material facts. The application was made by the defendant in the original writ who for convenience will be referred to as "the defendant" in this application.

The writ concerned was taken out by the plaintiff on October 8, 1976. In the Statement of Claim the plaintiff alleged that he was the tenant of the whole of premises known as Lot No. 1288, Jalan Ampang, Ipoh, paying a rental of $150 per month to one Tan Beng Kai, the landlord. However, in July 1976, the defendant entered upon the said land and removed the fruit trees from the said land, erected a foundry on the land and among other things dumped and scattered iron pipes, concrete pipes, etc., on the land thus blocking the front and the back entrances to the plaintiff's premises. In the writ the plaintiff asked for an injunction against the defendant or his servants or agents to forthwith remove the fencing encircling the premises and also to remove all obstacles allegedly created thereon by the defendant and the plaintiff also asked for damages. On the same day that the writ was taken out the plaintiff also asked in a Summons-in-Chambers for an interim injunction supported by an affidavit sworn on the same date. In the affidavit the plaintiff attached a copy of the tenancy agreement between him and the said Tan Beng Kai. He alleged in the affidavit that he had always been paying the monthly rental regularly and that with the knowledge of the landlord he started what would appear to be a small factory producing toothpicks in the said premises. But because of the obstacles created by the defendant or his servants or agents as referred to earlier, he had not been able to continue with his business on the said premises. Apart from the copy of the tenancy agreement attached to the affidavit a copy of another document was also attached (MZ 2) which was a letter addressed to the solicitors of the landlord extending the said tenancy for another year. Also attached to the affidavit are several photographs showing the alleged obstacles on the land surrounding the premises. An interim injunction was granted by the Registrar effective up to and including the 11th day of October, 1976. On October 11, 1976, another application was made on behalf of the plaintiff to extend the interim injunction to be effective until the trial of the civil suit. The grounds of the application were the same. An interlocutory injunction was

granted on the same terms. On October 14, 1976, the defendant entered appearance and on October 18, 1976, he filed his defence. In the defence it was disclosed that the defendant has since October 6, 1976, become the owner of the premises in question. The transfer of the land was completed on that day although it would appear that some agreement had been reached between the landlord and the defendant about the purchase and sale since as early as July 29, 1976. The defendant in his defence also denies there was any obstruction caused or any obstacles made on the land in question or that the plaintiff has been in any way hindered from entering the premises. The defence also disclosed that in fact the former landlord purporting to exercise his right of re-entry under clause 5(a) of the tenancy agreement had re-entered upon the said land upon the default of payment of rental by the plaintiff and the re-entry was effected on September 20, 1976. The former landlord, i.e., the landlord named in the said tenancy agreement also swore an affidavit supporting the Notice of Motion and in his affidavit he said that he had informed the plaintiff about the transfer on or around October 6, 1976, i.e., about two days before the plaintiff filed the writ. Furthermore he said in the affidavit that the plaintiff was tenant only in respect of the building and not the whole of the land and this was expressly mentioned in the said tenancy agreement. Finally the tenancy was only for use of the premises as a garage but the plaintiff without his knowledge had started a factory in the said premises. Attached to the affidavit of the defendant was the same copy of the said tenancy agreement, a copy of the purchase agreement of the said land, several photographs of the premises which purport to show that there was in fact no obstacle or obstruction to the premises and a sketch plan showing a clear and unobstructed access to the building. Attached to the affidavit of the former landlord was also a copy of a letter from him to the plaintiff (TBK 1) giving notice to the plaintiff that the rentals in respect of December 1975, January and February 1976 had not been paid and that payment must be made within seven days thereof in lieu whereof the plaintiff should vacate the premises. A copy of another letter was also attached to the affidavit of the former landlord (TBK 2) pointing out the clause of re-entry in the said tenancy agreement and that there was arrears of rental for the month of December 1975, January, February and March 1976 with a notice to deliver vacant possession on or before March 31, 1976.

In reply to these the plaintiff swore an affidavit in which he denied that there was any actual arrears of rentals unpaid. According to his affidavit several attempts were made by him to pay the rentals but were refused. The plaintiff alleged in the affidavit it was the sole purpose of the defendant in collusion with the former landlord to evict him from the premises since a clause in the purchase agreement requires vacant possession. In fact clause 10 in the agreement between Tan Beng Kai and the defendant (attached to affidavit of defendant dated October 16, 1976) specifically states that "the vendor shall use his best endeavour to evict the tenant ... and for the purpose of such eviction, the vendor shall sign all papers and documents and do all acts and things as may be required by the purchaser." The plaintiff also alleged in the affidavit that the former landlord in the said tenancy agreement knew all along that he was operating a factory in the said premises and had visited him several times at the said premises. Referring to the photographs accompanying the affidavit of the defendant the plaintiff alleged that these photographs were in fact taken after the injunction was obtained from the court and thus showing clear access to the premises. Finally the plaintiff also alleged in his affidavit that the former landlord had in fact agreed that he would use the building as well as some space for his use although not the whole of the surrounding land.

The sole ground on which the Notice of Motion is based is of course as set out in paragraph (a) of the defendant's affidavit, that is to say, that the plaintiff had not stated the facts fully and accurately and that the plaintiff had not disclosed all material facts. It is an established law that the court in an application of this nature must be satisfied that the person who asked for the interlocutory injunction did not mean to deceive the court and that the court is bound to maintain the principle that those who come "asking *ex parte* for injunctions must proceed with the highest good faith, and keep back no material facts." — see *Schmitten* v. *Faules*.[1] This standard has been maintained strictly and it was even held that when a party comes for an injunction there is no obligation upon him to ascertain what are the important facts of the case and it is no excuse to say that the party does not consider the facts to be important. The party applying for *ex parte* injunction is bound to state not only the facts that he considers material but all facts within his knowledge that are material and therefore if it is shown that a plaintiff had innocently omitted to state circumstances which turn out to have material bearing upon his rights the injunction should be dissolved — see *Daglish* v. *Jarvie*.[2]

I think it is pertinent in this case to examine first of all the areas where it is alleged that the plaintiff had either misled the court or had omitted material facts. Judging from the affidavits filed the areas seem to be as follows: —

(1) that he is the tenant of the "whole of the premises" known as Lot No. 1288, Jalan Ampang, Ipoh, whereas in fact clause 1 of the tenancy agreement states that the subject of the tenancy is the premises No. 1288, Jalan Ampang, Ipoh, "excluding the surrounding land";

(2) that he never disclosed that he was in default of rentals in the Statement of Claim nor in the application asking for the injunction;

(3) that he never disclosed that he commenced the business without the knowledge of the landlord and that the business was "unlawful" and finally that the plaintiff being a teacher and therefore a public servant cannot deal in business;

(4) that the photographs accompanying the affidavit of the plaintiff were misleading and that the real situation is as disclosed in the photographs accompanying the affidavit of the defendant.

However on closer analysis it would also seem clear to me that the areas where the defendant has alleged that the plaintiff has misled the court are also the areas of dispute in the suit. The conflicting affidavits clearly indicate that it would be impossible to come to any definite finding on those disputed issues without a proper trial.

The law in granting or refusing interlocutory injunctions has a long and interesting history and the celebrated House of Lords case of *American Cyanamid Co.* v. *Ethicon*[3] was the most recent development. The simplest approach is expressed in an earlier case of *The Great Western Railway Co.* v. *The Birmingham & Oxford Junction Railway Co. & Ors.*[4] where the Lord Chancellor said:

"It is certain that the court will in many cases interfere and preserve property in *status quo* during the pendency of a suit, in which the rights to it are to be decided, and that without expressing, and often without having the means of forming, any opinion as to such rights.... It is true that the court will not so interfere, if it thinks that there is no real question between the parties;... In order to support an injunction for such purpose, it is not necessary for the court to decide upon the merits in favour of the Plaintiff."

The traditional theory underlying the grant or refusal of interlocutory injunction has always been that the court abstains from expressing any opinion upon the merits of the case until the trial — see *Wakefield* v. *Duke of Buccleugh.*[5] However more recently the courts have displayed what some refer to as a more robust approach, i.e. an approach guided by the apparent strength or otherwise of the plaintiff's case as disclosed in affidavits. In 1970 in *Cavendish House (Chettenhan) Ltd.* v. *Cavendish-Woodhouse Ltd.*[6] Harman L.J. (with Salmon L.J. concurring) said: "Therefore you start off with a *prima facie* case. That, of course is the essential prelude to the granting of interlocutory relief." This approach has now been abolished by the House of Lords in the *American Cyanamid case* and new principles have been set out in the following sequence. Firstly to discover whether the plaintiff's case is frivolous or vexatious. If it is not, then to decide in whose favour the balance of convenience lies. If these factors are evenly balanced it may not be improper for the court to take into account any tipping in the balance as revealed by affidavits.

In *Fellowes* v. *Fisher* (C.A.)[7] Lord Denning discussed the *American Cyanamid case* and said that we are no longer to ask whether the plaintiff has made a *prima facie* case and that all we need ask now is the question whether there is a serious question to be tried. If there is, then we should take measures to preserve the *status quo* until the trial. In the *American Cyanamid case* the House of Lords held that there were serious questions to be tried and that on the balance of convenience, the right course was to grant an interlocutory injunction. The traditional rule of starting off with the test of *prima facie case* should no longer be applied. In fact the House of Lords in that case stated that they were taking the opportunity to declare that "there is no such rule". In *Hubbard* v. *Pitt*[8] Lord Denning again said of the principles involved that the first question to be asked is simply whether there was a serious question to be tried in the sense that the claim was not frivolous or vexatious. Secondly, if the plaintiffs were to succeed at the trial, whether they would be adequately compensated for the interim continuance of the defendant's activities. Conversely is the question that if the defendants were to succeed at the trial, whether they would be adequately compensated for the interim restriction on their activities which the grant of an interlocutory injunction would have imposed. The judge then considers the balance of convenience, and if the relevant factors were evenly balanced the court should grant an interlocutory injunction which would maintain the *status quo.* It is said that at that stage the court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits.

Applying the above principles to the matters as disclosed in the affidavits in this case it is my view that the motion should be dismissed and the interlocutory injunction to remain. However having regard to the period of the tenancy in dispute it would be a proper case for me also to direct an early trial. Accordingly the motion is dismissed and an early trial ordered. Having regard to the fact that none of the points referred to above were brought out on behalf of the plaintiff I shall make no order as to costs.

Motion dismissed, early trial ordered.

Solicitors: *Lim Seng Chun & Co.; Lim Boon Seng.*

HAJI CHE SU BIN HAJI AWANG v. CHAN CHEONG

[A.C.J. (Abdul Razak J.) November 14, 1976]

[Kuala Trengganu — Civil Appeal No. 7 of 1973]

Workmen's Compensation — Worker — Meaning of — Right to appeal — Points of law — Public interest — Workmen's Compensation Ordinance, 1952, ss. 30(1) and (5) and 39(2).

This was an appeal against the decision of the arbitrator under the Workmen's Compensation Ordinance wherein he ordered the appellant to pay $2,016 to the respondent as compensation for injuries sustained by the respondent while working in the course of the appellant's employment. The appeal turned principally on the question whether the respondent was a "workman" within the meaning of the Ordinance. The arbitration came before the President of the Sessions Court on a purported reference made by the Commissioner of Labour under section 30(1) of the Ordinance.

Held: even if it could be said that the question whether the respondent was a workman was a point of law, it is not every point of law that gives a right to appeal; it must be a question of law of public interest. The fact that it is a question of law does not *per se* make it one of public interest.

Cases referred to:-

(1) *Golden Hope Rubber Estate* v. *Muniammah* [1965] 1 M.L.J. 5.
(2) *Smith* v. *General Motor Cab Co.* [1911] A.C. 188.
(3) *Simmons* v. *Heath Laundry Co.* [1910] 1 K.B. 548.
(4) *Lewis* v. *Stanbridge* Willis 175.
(5) *McNally* v. *Fitzgerald* Willis 175.
(6) *Ryan* v. *Tipperary* Willis 175.
(7) *Daniels* v. *Great Central Railway* Willis 176.
(8) *Underwood* v. *Perry* Willis 176.
(9) *Commissioner for Labour* v. *Chop Choong Joo* [1953] M.L.J. 76.